District Court of Allegheny County, Pennsylvania.

COMMONWEALTH EX REL. MILLINGAR *v.* MICHAEL O'HARA.

The Bankrupt Act of 1867 suspends all action upon future cases arising under the insolvent laws of this state, where the laws act upon the same subject-matter and the same persons.

The Bankrupt Act suspends all proceedings under the Act of 12th July 1842, for the abolishment of imprisonment for debt and the punishment of fraudulent debtors, where the latter act operates on the same subject-matter and upon the same persons as the former.

A warrant of arrest is not regularly issued, and cannot be enforced, under the Act of 12th July 1842, pending a levy on the personal property of the defendant, by virtue of a *fi. fa.* in the sheriff's hands, issued on complainant's judgment, and pending the attachment of defendant's effects in the possession of the garnishee, by virtue of an execution-attachment issued on said judgment.

THIS was a proceeding by bench warrant, under the Act of July 12th 1842 (to abolish imprisonment for debt and to punish fraudulent debtors), at the instance of James Millingar, a judgment-creditor of O'Hara & Robinson, against Michael O'Hara, a member of the said firm. The affidavit of complainant, upon which the warrant of arrest in this case was issued, set forth the recovery of a judgment in this court, by the affiant against the firm of O'Hara & Robinson, upon a bond in the penal sum of $50,000, conditioned to indemnify him from his liability as indorser of certain promissory notes, drawn by the said firm, to the amount of $25,000—$8500 of which notes, it is averred, had become due and had been protested for non-payment, and which he had become liable to pay, and one of which, amounting to $2500, he had actually paid.

The affidavit charged that the defendant bargained and sold a large quantity of tools and other property of the firm, of the value of $1500, for $400, and that he so disposed of the said property with intent to defraud his creditors:

That he gave to his wife, or to some person in trust for her, about $7000 of the moneys of the firm, with intent to defraud his creditors:

That he removed out of the county certain property, to wit: bank notes, United States treasury notes, drafts, and bills of exchange, amounting in the whole to about $20,000, with intent to defraud his creditors:

That he has property and money which he fraudulently conceals, and unjustly refuses to apply to the payment of affiant's judgment:

That he had disposed of a portion of his property and was about to dispose of other portions of his property, with intent to defraud his creditors.

Upon the presentation of the affidavit, a warrant for the arrest of the defendant was issued in accordance with the requirements of the act, and he was thereupon arrested and brought before Judge WILLIAMS for hearing; but, at his instance, the hearing of the case was adjourned to a subsequent day, upon his giving bond, with surety, for his appearance at that time. At the adjourned hearing his counsel moved to quash the warrant on two grounds:

I. Because the Bankrupt Act of 2d March 1867 supersedes all proceedings under the Act of 12th July 1842, where, as in this case, the complainant's debt is provable under the Bankrupt Act, and the defendant is amenable to its provisions.

II. The warrant was irregularly issued, and cannot be enforced under the provisions of the Act of 12th July 1842, because at the time the said warrant was issued there was a pending levy on the personal property of the partnership, consisting of the materials, stock, manufactured ware, and merchandise of the said firm, and upon the individual property of the defendant, embracing his stock in the Pittsburgh and Connellsville Railroad Company, and in the Allegheny Valley Railroad Company, by virtue of a *fi. fa.* issued on complainant's judgment; and because all the moneys and effects of the defendant in the possession of the Exchange National Bank have been attached, by virtue of an attachment in execution issued on said judgment and served upon the garnishee, as appears by the said writs and the indorsement of the sheriff thereon.

The motion was thereupon argued by counsel on both sides and held under advisement, and the further hearing of the case adjourned, upon the defendant's entering into a new bond, with surety, for his appearance.

The opinion of the court was delivered by

WILLIAMS, J.—In considering and determining the questions raised by the defendant's motion, I have availed myself of the

learning and judgment of my brethren—the President Judge of this court, and the President and Associate Judges of the Court of Common Pleas. At my request, and with the view of securing uniformity of decision and practice under the act authorizing this proceeding, they have investigated and considered the questions with me, and the result is that we have unanimously come to the following conclusions:

I. That the Bankrupt Act, as soon as it went into operation, *ipso facto* suspended all action upon future cases arising under the insolvent laws of this state, where the insolvent laws act upon the same subject-matter and the same persons as the Bankrupt Act.

II. That the Bankrupt Act suspends all proceedings under the Act of 12th July 1842, where the latter act operates on the same subject-matter and upon the same persons as the former.

III. That the Bankrupt Act operates upon the subject-matter of the complaint in this case and upon the persons affected thereby, and therefore it suspends the operation of the Act of July 12th 1842, under which the warrant for the defendant's arrest was issued.

IV. That even if this were not so, the warrant in this case was not regularly issued, and cannot be enforced, under the provisions of the Act of July 12th 1842, pending a levy on the personal property of the partnership and the individual property of the defendant, by virtue of the *fi. fa.* in the sheriff's hands, issued on complainant's judgment; and pending the attachment of defendant's effects in the possession of the garnishee, by virtue of the execution-attachment issued on said judgment.

V. That the warrant issued in this case must, therefore, be quashed.

But before proceeding to make the order it may be proper to give briefly the reasons in support of the conclusions to which we have come.

I. The Constitution of the United States gives to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States. How far this power supersedes state legislation was at one time a matter of much discussion, upon which judges differed in opinion. Some held that the power in Congress is exclusive of that of the states; and, whether exerted or not, it supersedes state legislation: *Golden* v. *Prince*,

3 Wash. Circ. Rep. 313. Others maintained that the power in Congress is not exclusive, and that, when unexerted, the states are at liberty to exercise it; and this opinion is now firmly established by judicial decisions: *Sturgis* v. *Crowninshield*, 4 Wheat. 122; *Ogden* v. *Saunders*, 12 Id. 273. The well-settled doctrine on the subject is that the powers granted to Congress are not exclusive of similar powers existing in the states, unless where the Constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states. In all other cases the states retain concurrent authority with Congress, except when the laws of the states and of the Union are in direct and manifest collision on the same subject, and then those of the Union, being the supreme law of the land, are of paramount authority, and the state laws so far, and so far only, as such incompatibility exists, must necessarily yield. But in the case of concurrent powers, when once the legislature of the Union has exercised its powers on a given subject, the state power over that same subject, which was before concurrent, is by that exercise prohibited: 1 Kent's Com. 390–1. This doctrine has been applied by the courts to the power of Congress on the subject of bankruptcies; and it has been held that though the power in Congress is not exclusive of the states, and when unexerted the states are at liberty to exercise the power in its full extent, unless so far as they are controlled by other constitutional provisions; yet when Congress has acted upon the subject, to the extent of the national legislation, the power of the states is limited and controlled: 4 Wheat. 122; 12 Id. 273.

Let us then apply these principles to the question before us. If the Bankrupt Act conflicts with the insolvent laws of this state, the operation of the latter is suspended so long as the bankrupt law continues in force. It is true that there is a wide difference between the Bankrupt Act and our insolvent laws. as respects the relief afforded to the debtor; for, while the bankrupt may be discharged from his debts, the insolvent debtor is only discharged from imprisonment. And there are marked differences in other respects. But these differences in the scope and purpose of the acts, and in the regulations contained therein, do not necessarily prevent the acts from conflicting with each other. On the contrary they may occasion the

conflict. The line of partition between bankrupt and insolvent laws is not so distinctly marked, as to enable any person to say with positive precision, what belongs exclusively to the one and not to the other class of laws. It is difficult to discriminate with accuracy between bankrupt and insolvent laws; and therefore a bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law: 2 Kent's Com. 390. As respects the laws in question they both operate upon the same subject-matter, and upon the same persons, and they provide in some respects a different rule for the distribution of a debtor's effects among his creditors. They are therefore in direct and manifest collision with each other, and the laws of the state must yield to the paramount authority of the national legislature. And so the question was decided in *Ex parte Lucius Eames*, 2 Story Rep. 322, cited by defendant's counsel. It was there held that the Bankrupt Law of 1841, upon going into operation in February 1842, *ipso facto* suspended all action upon future cases arising under the state insolvent laws, where the insolvent persons were within the purview of the Bankrupt Law. In delivering the opinion Judge STORY said: "It appears to me that both systems cannot be in operation or apply at the same time to the same persons; and where the state and national legislation upon the same subject and the same persons come in conflict, the national laws must prevail, and suspend the operation of the state laws. This, as far as I know, has been the uniform doctrine maintained in all the courts of the United States." And, after referring to the different opinions expressed by the judges in the case of *Sturgis* v. *Crowninshield*, 5 Wheat. 122, as to the question of the exclusive power vested in Congress by the Constitution of the United States to pass a Bankrupt Law, he says: "But all the court were agreed that when Congress did pass a Bankrupt Act, it was supreme, and that the state laws must yield to it and could no longer operate upon persons or cases within the purview of such act. * * * * * It seems to me, therefore," he adds, "that nothing remains upon which an argument can be founded, that the insolvent laws of Massachusetts are not, as to persons and cases within the purview of the Bankrupt Act, completely suspended. Each system is to act upon the same subject-matter, upon the same property, upon the same rights, and upon the same

persons—creditors as well as debtors. Both cannot go on together without direct and positive collision; and the moment that the Bankrupt Act does or may operate upon the person or the case, that moment it virtually supersedes all state legislation."

And in the case of *Griswold* v. *Pratt*, 9 Metc. 16, it was subsequently held by the Supreme Court of Massachusetts that while the United States Bankrupt Act of 1841 was in force, proceedings against a debtor, under the insolvent laws of the state, were unauthorized and void, if the debtor and his property were subject to the operation of the Bankrupt Act, although no proceedings under it were had against him. It was conceded in that case, as it has been by the complainant's counsel in this, that the effect of the Bankrupt Law was necessarily to suspend all state laws with which it came in conflict; but it was contended there, as it has been in this case, and as was ruled in *Zeigenfuss's Case*, 2 Iredell 463, that a state insolvent law may exist and operate with full vigor, until the Bankrupt Law attaches itself upon the person or property of the debtor, by proceedings instituted in bankruptcy; and that no case of conflict can arise until after the proceedings in bankruptcy have reached that state in which the debtor has been judicially declared a bankrupt. But this position, however plausible it may appear at first view, cannot, as the court say, be sustained. The right to proceed under the insolvent law of the state, the Bankrupt Law being in full force, must be placed on a firmer basis than that of the failure of the insolvent to apply to the District Court of the United States for the institution of proceedings in bankruptcy. If the proceedings under the insolvent law are valid at all, they must be valid to the extent of carrying out and perfecting such proceedings after they have once been instituted. Such effect has always been admitted to attach to proceedings legally commenced before the Bankrupt Law went into operation, but then pending. Sound principle would require that, in all cases where proceedings could be legally instituted, they should have the legal capability of being perfected and closed, under the state law. But under the view taken of this question on all sides, and as conceded on the part of the plaintiff, the proceedings under the state insolvent law, by virtue of which he claims the property in controversy, might be wholly superseded and rendered void, at the will of the insolvent debtor, by filing his petition in bankruptcy, during any stage of the pro-

ceedings under the insolvent law, before his assets should be divided among his creditors.

There can be no doubt, as it seems to me, both upon reason and authority, that the present Bankrupt Act supersedes all local laws acting upon the same rights and affecting the same persons and the same property.

II. And for the like reasons the Bankrupt Act suspends all proceedings under the Act of 1842, by virtue of which the warrant in this case was issued. The very matters charged in the affidavit of complainant as a ground or cause for the arrest of the defendant, constitute and are declared to be acts of bankruptcy under the provisions of the 39th section of the act, and for which an ample remedy is provided by the 40th section. By virtue of the provisions of this latter section the creditor, upon filing his petition, may obtain an order on the debtor to appear in five days from the service thereof and show cause why he should not be adjudged a bankrupt; and the court may also, by its injunction, restrain the debtor and any person, in the mean time, from making any transfer or disposition of the debtor's property, and from any interference therewith; and if there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels, or his evidences of property, or make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district commanding him to arrest the alleged bankrupt, and him safely keep, unless he shall give bail to the satisfaction of the court for his appearance, from time to time, until the decision of the court upon the petition, or the further order of the court; and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court. The act, it will be seen, provides an ample and effectual remedy for all the matters complained of and charged against the defendant in this case. But the provisions of the Act of 1842 are in direct conflict with the provisions of the Bankrupt Act. The Act of 1842 provides for the discharge of the defendant upon his paying the debt or demand with costs of suit; or upon his giving security to pay the same with interest within the time specified in the act; or upon his giving bond, with sureties, that he will not remove or assign his property with intent to defraud his creditors, or with a view to give a prefer-

ence to a creditor for an antecedent debt *until* the demand of the complainant with costs shall be satisfied; or upon giving bond, with sureties, to take the benefit of the insolvent laws. The Bankrupt Act forbids all preferences, and sets them aside where they are made for the purpose of giving one creditor an advantage over another; and, as we have seen, it suspends the operation of the insolvent laws. It is therefore clearly in conflict with the Act of 1842, which recognises and makes provision for such preferences, and is in some respects a supplement to the insolvent laws of the state.

III. But, aside from the provisions of the Bankrupt Act, the warrant is irregular and cannot be legally enforced. It was not the intention of the legislature, in adopting the Act of 1842, to authorize the arrest and imprisonment of a debtor, as a civil remedy in any case in which he could not be arrested and imprisoned before the passage of the act. But pending a levy on personal property by virtue of a *fi. fa.*, the creditor, before the passage of the act, could not subject his debtor to imprisonment on a *ca. sa.* And if he could not, how can it be said that, by the provisions of the Act of 1842, the defendant in this case cannot be arrested? If the Act of 1842 had not been passed he could not be arrested pending the levy on the *fi. fa.*, and it is only in a case where by the provisions of the act he cannot be arrested, that a warrant can issue. But it is unnecessary to spend time in the further discussion of the subject. The question was decided by the District Court of Philadelphia in the case of *Neal* v. *Perry*, 4 Penna. L. J. 410. It was there held, in an able opinion delivered by the President Judge, that pending a levy on real estate, by virtue of a *fi. fa.*, a warrant of arrest, under the Act of the 12th of July 1842, cannot issue against the defendant. If this be so, there is greater reason for holding that such a warrant cannot issue, pending a levy on personal property, by virtue of a *fi. fa.* in the hands of the sheriff, which is regarded as satisfaction, for some purposes, by the law as long as it subsists.

The motion of defendant's counsel is, therefore, sustained on both grounds; and the warrant issued in his case is hereby quashed.